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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

4 **LUIS ROMAN LOPEZ,**

5 **Petitioner,**

6 **v.**

7 **UNITED STATES OF AMERICA,**

8 **Respondent.**

CIVIL NO. 17-1039 (GAG)

Related to Crim. Case No. 12-038 (GAG)

9 **OPINION AND ORDER**

10 Before the Court is Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant
11 to 28 U.S.C. § 2255 in light of Johnson v. United States, 135 S. Ct. 2551 (2015). (Docket No. 1.)

12 On January 19, 2012 a grand jury indicted Roman Lopez with: 1) aiding and abetting in a
13 Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), ("Count One") and, 2) aiding and abetting
14 in the possession of a firearm in furtherance of a "crime of violence" –aiding and abetting a Hobbs
15 Act Robbery, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) ("Count Two"). Roman Lopez pled
16 guilty to count two of the indictment. On November 13, 2012, the Court sentenced him to seventy-
17 two months of imprisonment. (See Case No. 12-038 (GAG), Docket No. 101.)

18 On January 26, 2015, the Supreme Court in Johnson, ruled unconstitutional the imposition
19 of an enhanced sentence under the residual clause of the ACCA,¹ finding the statute's language

21 ¹ Section 922(g) forbids convicted felons, persons committed to mental institutions, and drug users from
22 shipping, possessing, and receiving firearms. 18 U.S.C. § 922(g). For the most part, the statute punishes violators
23 to a maximum of ten years' imprisonment. § 924(a)(2). However, if the violator has three or more earlier
convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act ("ACCA")
increases the violator's prison term to a minimum of fifteen years and a maximum of life imprisonment. §
924(e)(1); Johnson v. United States, 559 U.S. 130 S.Ct. 1265 (2010).

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1 vague in violation of the Due Process Clause. Then, on April 18, 2016, Supreme Court gave the
 2 Johnson ruling retroactive effect to cases on collateral review. Welch v. United States, 136 S. Ct.
 3 1257, 1568 (2016).

4 On January 11, 2017, Roman Lopez filed his petition for habeas relief. Petitioner argues
 5 that Johnson “[b]y logical extension” invalidates the similarly worded residual clause of section
 6 924(c). (Docket No. 1). The Government, on the other hand, argues Roman Lopez does not raise
 7 a cognizable claim under Johnson and that collateral attack is not appropriate. (Docket No. 5.)

8 **I. Legal Analysis**

9 The void-for-vagueness doctrine prohibits the government from “taking away someone’s
 10 life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice
 11 of the conduct it punishes, or so standardless that it invites arbitrary enforcement” in violation of
 12 the Fifth Amendment. Johnson, 135 S. Ct. at 2556.

13 In rendering the residual clause void for vagueness, the Johnson Court found that “the text
 14 of the residual clause provides little guidance on how to determine whether a given offense
 15 “involves conduct that presents a serious potential risk of physical injury.” Welch 136 S. Ct. at
 16 1261. It pointed to two features of the statute’s language made it vague. First, it noted that the
 17 residual clause “leaves grave uncertainty about how to estimate the risk posed by a crime” as it
 18 impermissibly ties “assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to
 19 real-world facts or statutory elements.” Johnson, 135 S. Ct. at 2557. Second, the uncertain risk

22 The ACCA defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one
 23 year that:” (i) has as an element the use, attempted use, or threatened use of physical force against the person of
 24 another” (“the elements clause”) or *(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.* § 924(e)(2)(B) (emphasis added). The end of subsection two is the infamous residual clause.

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1 required for a crime to qualify as a violent felony rendered the statutory language vague. “It is one
2 thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another
3 to apply it to a judge-imagined abstraction.” Id. at 2558.

4 a. Section 924(c)’s Residual Clause

5 Petitioner argues section 924(c)(3) is unconstitutionally vague. He contends that Johnson
6 overruled the “ordinary case” approach to determine when a felony qualifies as a “crime of
7 violence” by finding it was unconstitutionally vague. Consequently, he posits the same reasoning
8 applies to similarly worded statutes, such as 924(c)’s residual clause.

9 Roman Lopez’s entire argument is predicated upon an overly broad reading of the
10 underlying rationale in Johnson, instead of the actual holding of the case. “Both clauses “suffer
11 from exactly the same double indeterminacy that made the ACCA’s residual clause constitutionally
12 infirm.” (Docket No. 1 at 4). Petitioner extrapolates a broader effect to Johnson’s finding that a
13 district court “ordinary case” approach under the ACCA constitutionally flawed automatically
14 translates to any instance in which a district court engages in said assessment. Petitioner reasons
15 “Johnson did not turn on the *type* of risk involved but on *how* courts are directed to assess and
16 quantify that risk.” (Docket No. 1 at 4.) “Though the risk at issue in the ACCA is risk of physical
17 injury, while the risk at issue in Section 924(c) is a risk that physical force will be used against
18 person or property, the distinction makes no difference to the Due Process problem identified in
19 Johnson.” Id.

21 First, the language of the clauses at issue is not identical. Section 924(c) defines “crime of
22 violence” as an offense that is a felony and: “(A) has as an element the use, attempted use, or
23 threatened use of physical force against the person or property of another,” or “(B) that by its

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1 nature, *involves a substantial risk that physical force against the person or property of another*
2 *may be used in the course of committing the offense.*” § 924(c)(3)(emphasis added). ACCA
3 defines the term “violent felony” as “any crime punishable by imprisonment for a term exceeding
4 one year. . . , that-- (i) has as an element the use, attempted use, or threatened use of physical force
5 against the person of another” (“the elements clause”) or *(ii) is burglary, arson, or extortion,*
6 *involves use of explosives, or otherwise involves conduct that presents a serious potential risk of*
7 *physical injury to another.*” § 924(e)(2)(B) (emphasis added).

8 Petitioner contends that the differences in wording do not alter the constitutional bearing of
9 the ruling. Petitioner’s theory does not convince the Court. The distinct language of the statutes
10 weighs heavily against Petitioner’s argument. The Supreme Court paid close attention to the
11 enumerated offenses that precede the ACCA’s residual clause and found that these contributed to
12 the clauses’ impermissible uncertainty. “By asking whether the crime “*otherwise* involves conduct
13 that presents a serious potential risk,” moreover, the residual clause forces courts to interpret
14 “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and
15 crimes involving the use of explosives. These offenses are “far from clear in respect to the degree
16 of risk each poses.” Johnson, 135 S. Ct. at 2558. In reaching its conclusion, the Court recognized
17 that “[e]ach of the uncertainties in the residual clause may be tolerable in isolation, but “*their sum*
18 *makes a task for us which at best could be only guesswork.*” Johnson, 135 S.Ct. at 2560 (emphasis
19 added).

20 What is more, the Johnson Court anticipated that its ruling would trigger challenges to other
21 statutes, such as the issue Petitioner brings before the Court and stated the following.
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23 The Government and the dissent next point out that dozens of federal and state
24 criminal laws use terms like “substantial risk,” “grave risk,” and “unreasonable
risk,” suggesting that to hold the residual clause unconstitutional is to place these

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provisions in constitutional doubt. Not at all. Almost none of the cited laws links a phrase such as “substantial risk” to a confusing list of examples. “The phrase ‘shades of red,’ standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red’ assuredly does so.

Johnson, 135 S. Ct. at 2561 (quoting James v. United States, 550 U.S. 192, 230 (2007) (SCALIA, J., dissenting)). With this, the Court set apart ACCA’s residual clause from the others,² and highlighted the role that the enumerated offenses played in their analysis and ultimately the Court’s ruling.

Section 924(c)(3) does not contain enumerated offenses; therefore, said portion of the Johnson analysis is inapplicable to the section 924(c). As a result, Petitioner’s extrapolation of “how courts are directed to assess and quantify the risk” is erroneous considering elements that were fundamental to the Johnson ruling are inapplicable to 924(c).

In sum, the breadth of the rule established in Johnson does not extend to Section 924(c).³ Consequently, the Court holds that the in the wake of Johnson and Welch, the residual clause of section 924(c) is still valid.

15 b. Petitioner’s challenge to 924(c) on collateral attack

16 In Welch the Supreme Court expressly delineated the narrow confines of its holding.
 17 Welch, 136 S. Ct. at 1264. By granting retroactive effect, the Court gave way to collateral
 18 challenges to enhanced sentences under ACCA. Id.

21 ² Earlier this week the Supreme Court declined to extend Johnson to the Federal Sentencing Guidelines
 22 § 4B1.2(a)’s residual clause, holding that that the Federal Sentencing Guidelines are not subject to vagueness
 23 challenges under the Due Process Clause. Beckles v. United States, No. 15-8544, 2017 WL 855781, at *1 (U.S.
 24 Mar. 6, 2017).

25 ³ My esteemed colleague, Senior Judge Daniel Dominguez also recently held that Johnson did not
 26 invalidate § 924(c)(3). See Manuel Fernandez Torres v. United States, Civil No. 14-1025, Docket No. 29.

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1 Applying the Teague v. Lane framework that generally bars the retroactive application of
 2 new rules to cases on collateral review as well as the “substantive rule” exception, reasoning that
 3 “[b]y striking down the residual clause, Johnson changed the substantive reach of the Armed Career
 4 Criminal Act, altering the range of conduct or the class of persons that the [Act] punishes.” Id. at
 5 1265 (quotations omitted).⁴

6 “Johnson affected the reach of the underlying statute rather than the judicial procedures by
 7 which the statute is applied, it is thus a substantive decision and so has retroactive effect under
 8 Teague in cases on collateral review.” Welch, 136 S. Ct. 1257. Pre-Johnson, ACCA applied “to
 9 any person who possessed a firearm after three violent felony convictions, even if one or more of
 10 those convictions fell under only the residual clause.” Id. After Johnson, the same person engaging
 11 in the same conduct is no longer subject to the Act and faces at most 10 years in prison. ACCA’s
 12 unconstitutionally vague residual clause “can no longer mandate or authorize any sentence. [I]n
 13 other words, ‘even the use of impeccable fact-finding procedures could not legitimate’ a sentence
 14 based on *that* clause.”” Welch, 136 S. Ct. at 1265 (citing United States v. United States Coin &
 15 Currency, 401 U.S. 715, 724 (1971)) (emphasis added).

16 Roman Lopez was sentenced on November 13, 2012. Johnson was decided two years and
 17 seven months after Petitioner’s sentencing. Moreover, he was sentenced for violating Section
 18 924(c) for possessing a firearm during and in relation to a “crime of violence” –aiding and abetting
 19 a Hobbs Act Robbery. He was not sentenced under Section 924(e)’s residual clause sentence
 20 enhancement. Thus, collateral habeas review under Section 2255 is not appropriate. Challenges to
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 23 ⁴ Substantive rules are those that “alter the range of conduct or the class of persons that the law punishes”
 24 including decisions “that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional
 determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.”
Id.

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similarly worded residual clauses under the Johnson rationale should be raised on direct review, not collateral attack. Simply put, petitioner may not avail himself of Section 2255, because the Supreme Court in Johnson did not announce a new rule with respect to the residual clause of Section 924(c).

II. Conclusion

For the foregoing reasons, this Court finds that Roman Lopez is not entitled to federal habeas relief on his claims. Accordingly, the Court hereby **DENIES** Petitioner's request for federal habeas relief pursuant to 28 U.S.C. § 2255. All claims in petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 are hereby **DISMISSED** with prejudice.

CERTIFICATE OF APPEALABILITY

It is further ordered that in the event that Petitioner files a notice of appeal, a certificate of appealability should be issued considering the novel issue regarding the application of the Johnson ruling to 924(c)'s residual clause. The undersigned finds that "reasonable jurists could debate" over the issue at bar. Welch, 136 S. Ct. at 1263 (citing Slack v. McDaniel, 529 U.S. 473, 484, (2000)).

SO ORDERED.

In San Juan, Puerto Rico this 10th day of March, 2017.

s/ Gustavo A. Gelpí
GUSTAVO A. GELPI
United States District Judge